

### **Remarks**

Examiner Stulii is thanked for her careful review and consideration of the subject patent application. For the reasons that follow, and in light of the claim amendments, allowance is respectfully solicited.

As an initial matter, a number of the Section 112 rejections have been addressed by way of amendment. Specifically, the terminology “in the presence of yeast,” “allowing,” “more organoleptically neutral, and “compromised flavor” each have been excised from the claims. The rejections of claim 2, 3, and 36 are now moot. With regard to claim 5, no past tense is employed in the claim.

Applicant traverses the rejection of the claims for inclusion of the phrase “consisting essentially of.” The phrase “consisting essentially of” has long been an acceptable preamble in U.S. patent practice. The Examiner is respectfully referred to MPEP Section 211.03 and the cases cited therein, such as *In re Herz*, 537 F.2d 549, 190 U.S.P.Q. 461 (C.C.P.A. 1976). Indeed, in certain cases, other transitional language has been construed in the same manner as “consisting essentially of,” thus indicating acceptance and recognition of this term. See, e.g., *AFG Industries, Inc. v. Cardinal IG Company*, 239 F.3d 1239, 57 U.S.P.Q.2d 1716 (Fed. Cir. 2001). There is nothing whatsoever indefinite about this phrase.

Similarly, the “inactivating alcohol concentration” is clearly defined in the specification, such that there is nothing indefinite about this term. Further, one of ordinary skill in the art knows and recognizes that upon fermentation the alcohol content may rise to a level sufficient to inactivate the yeast. The present invention provides a novel method for such to occur.

With respect to the prior art rejections, Applicant notes that the Witt reference is assigned to Grain Processing Corporation, the assignee of the present application. Witt fails to disclose or render obvious the subject matter of the present application. In Witt,

the applicants were concerned with the *speed* of fermentation, and, more specifically, they desired fermentation to proceed as quickly as possible so a beer is formed more rapidly. Witt was not concerned about rate limiting effects, nor with the preparation of an organoleptically neutral fermented beverage. Accordingly, Witt failed to reach the inactivating alcohol concentration specified in the present application and now claimed herein (10-15%). Specifically, Witt discloses that the maximum alcohol concentration attainable is only 7.5%. See Witt, Column 8, lines 13-15). Witt accordingly fails to anticipate or teach the present claims, because Witt fails to disclose a method capable of achieving a concentration of 10% to 15% alcohol.

Clearly, Witt discloses fermentation to form a beer with a maximum alcohol concentration expected at 7.5%. This, as Witt discloses, is the product of rapid fermentation, and Witt does not teach or disclose rate limiting effects in order to reach inactivating alcohol concentration. It would be improper to extrapolate the teachings of Witt to arrive at the subject matter of the present application, and further to expect that the teachings of Witt would yield a beverage having the specified alcohol content. To the contrary, Witt actually teaches away from the present invention, whereby an inactivating alcohol concentration in the range of 10% to 15% is achieved.

The new claims are further removed from Witt. Those claims specify a starch hydrolyzate from which ash and fat present in the starch granule has been removed. Witt teaches away from the invention as recited in the new claims, because Witt discloses a process for preparing a starch hydrolyzate in which ash and fat were not removed prior to fermentation (*see, e.g.*, Witt, Column 3, line 64 through Column 4, line 6). Again, Witt not only fails to anticipate these claims, Witt teaches away from subject matter of these new claims. In the preparation of a fermented product (a conventional beer), Witt is unconcerned with removal of fat and ash, and the teachings of Witt cannot be extrapolated to arrive at the present invention recited in the new claims. Of course, the claims are patentable, in any event, over Witt for the reasons identified above.

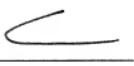
In the Office Action, Examiner asserts that fermentation to within 1% of the inactivating alcohol concentration would have been an obvious variant of Witt (see page 7). Applicant respectfully disagrees. Again, Witt, concerned with rapid fermentation and did not disclose removal of rate limiting effects to achieve inactivating alcohol concentration levels. Nothing in Witt discloses or suggests fermentation to the level specified in the claims. Further, Examiner makes reference to another reference (the *Brewing Science* publication) while drawing the conclusion that such a limitation ("1% of the inactivating alcohol concentration") is not novel. Nevertheless, Examiner has not relied upon the *Brewing Science* publication for these teachings, but instead is relied on for disclosure of *S. Cerevisiae*. Indeed, *Brewing Science* does not disclose such fermentation to 1% of the inactivating alcohol content, thus failing to overcome the deficiencies of the primary Witt reference.

Certain of the original claims were rejected over Witt in view of two secondary references, Dalgleish and Drager. These references were relied upon by Examiner for certain features of the dependent claims, but failed to overcome the deficiencies of Witt with respect to the patentability of the independent claims. Thus, the dependent claims are, likewise, allowable over the cited references.

In short, the pending claims are allowable under Section 112 and over the prior art cited in the Office Action. Allowance is respectfully solicited.

Respectfully submitted,

Date: January 9, 2008

By: 

Allen E. Hoover  
Reg. No. 37,354  
BANNER & WITCOFF, LTD.  
10 S. Wacker Drive #3000  
Chicago, Illinois 60606  
Tel: (312) 463-5000  
Fax: (312) 463-5001